

**RECEIVED**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE MIDDLE DISTRICT OF ALABAMA**  
**NORTHERN DIVISION**

2005 JUL 27 P 3:50  
**LONNIE LEWIS,**

**Plaintiff,**

**v.**

**FREIGHTLINER OF HOUSTON,  
INC.,**

**Defendant.**

**CIVIL ACTION NO.:** 2:05CV690-B

**MOTION TO DISMISS AND/OR TO TRANSFER VENUE**  
**OF DEFENDANT HOUSTON FREIGHTLINER, INC.**

**COMES NOW** the Defendant, Houston Freightliner, Inc., incorrectly named in the Complaint as Freightliner of Houston, Inc., (hereinafter referred to as "Houston Freightliner"), and moves this Honorable Court to dismiss Plaintiff's complaint and each count and cause thereof, separately and severally, and/or alternatively to transfer venue. In support of this motion, Defendant Houston Freightliner sets forth the following grounds, to wit:

1. Defendant Houston Freightliner avers that Plaintiff's complaint and each count and cause thereof are due to be dismissed based upon lack of jurisdiction over the person.
2. The Defendant Houston Freightliner avers that the Plaintiff's complaint and each count and cause contain therein, separately and severally, fail to state a claim upon which relief can be granted as to Defendant.
3. Defendant Houston Freightliner avers that it has been improperly identified and named in the complaint.

4. Defendant Houston Freightliner avers that Plaintiff's complaint is due to be dismissed for insufficiency of process and/or insufficiency of service of process.

5. Defendant Houston Freightliner avers that Plaintiff's complaint and all claims of the Plaintiff, separately and severally, are due to be dismissed and are barred by applicable disclaimers and/or limitations of warranty delivered to Plaintiff.

6. Defendant Houston Freightliner avers that all claims asserted against Defendant for breach of warranty are facially deficient since all purchases by or repairs obtained by Plaintiff contained an express disclaimer of warranty by Houston Freightliner. A copy of the subject repair order and disclaimer of warranty executed by Plaintiff is attached as Exhibit "1" to the affidavit of Roger Poser filed contemporaneously herewith.

7. Defendant Houston Freightliner avers and alleges that Count IV of Plaintiff's complaint is due to be dismissed based upon the failure of Plaintiff to plead fraud with specificity and particularity as required by Rule 9(b) of the *Federal Rules of Civil Procedure*.

8. Defendant Houston Freightliner further avers that this action is due to be dismissed pursuant to §6-5-430, Code of Alabama, 1975, for the reasons set forth in this motion.

9. Alternatively, Defendant Houston Freightliner, Inc., avers that venue is improper in the United States District Court for the Middle District of Alabama, Northern Division. See, 28 U.S.C. §1391(a). Defendant further avers that following removal to this Honorable Court pursuant to 28 U.S.C. §1446(a) as the district and division where the action is pending, this lawsuit should be transferred to the United States District Court for the Southern District of Texas, Houston Division, pursuant to 28 U.S.C. §1404(a) and (c), for the convenience of the parties and witnesses, in the interests of justice and as the


district and division where the Defendant is deemed to reside, where the events or omissions giving rise to the claim occurred, where Defendant is subject to personal jurisdiction, and where said action could have been brought pursuant to 28 U.S.C. § 1391(a)(1), (2) and (3).


10. In further support of this motion, Defendant adopts by reference the alternative motion to stay proceedings and compel binding arbitration including the affidavit of Roger Poser and the exhibits thereto filed contemporaneously herewith.

**WHEREFORE**, these premises considered, Defendant Houston Freightliner, Inc., incorrectly named in the complaint as Freightliner of Houston, Inc., respectfully requests this Honorable Court to dismiss Plaintiff's Complaint and each count and cause thereof, separately and severally. Alternatively, Defendant Houston Freightliner, Inc., respectfully requests this Honorable Court to transfer venue of this action to the United States District Court for the Southern District of Texas, Houston Division.

Dated this the 27<sup>th</sup> day of July, 2005.

  
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ROGER S. MORROW (MOR032)

  
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JOEL H. PEARSON (PEA019)

  
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MEREDITH L. TOLAR (TOL006)  
Attorneys for Defendant Houston Freightliner,  
Inc., incorrectly named in the Complaint as  
Freightliner of Houston, Inc.

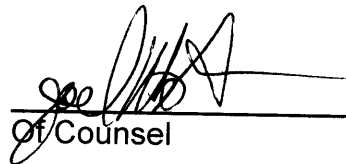
OF COUNSEL:

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this date mailed a true and correct copy of the foregoing to the following parties of record at their proper mailing addresses, by depositing a copy of the same in the United States Mail, First Class, postage prepaid and affixed thereto; this 27<sup>th</sup> day of July, 2005:

Honorable Todd E. Hughes  
Vercelli & Associates, P.C.  
1019 S. Perry Street  
Montgomery, Alabama 36104-5049

  
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Of Counsel